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COMPETITION DISTORTING ELEMENTS IN THE EFFECTIVE PUBLIC PROCUREMENT ACT

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Transparency International Hungary (TI) considers it is important that the objectives set forth in the preamble of the currently effective public procurement law are implemented, as the act has been passed by the Parliament, inter alia, to ensure fair competition.

Therefore, Transparency International Hungary together with the Foundation for Modern Public Procurement have collected the provisions of the currently effective law which, in our view, distort competition, open opportunities for misuse and thus pose a risk of corruption on public procurement procedures.

Our policy paper is intended to draw the attention of lawmakers who passed the new public procurement act to the adverse effects that distort competition, hoping that the new law will be able to provide solutions also to the accumulated problems.

We hope that the legislator considers it important for competition enhancing rules to be implemented in the widest possible sphere, and recognizes that these rules are able to enhance the more effective spending of public funds. Given the international and European trends, we consider it to be a reasonable objective that the legislator desires to enforce other economic policy considerations also along with the rules of public procurement, such as the advancement of small- and medium-sized enterprises. Nevertheless, it is important that these rules shall not create opportunities for misuse and shall not result in significant competition distortion.

Based on the currently effective Act on Public Procurement, Act CXXIX of 2003, the following competition distortion elements can be identified:

Relevant statutory provision(s):

Article 20/A *1.* In case a contracting authority experiences an obvious breach of provisions set out in Article 11 of Act LVII of 1996 on the Prohibition of Unfair Market Practices and Restriction of Competition (hereinafter referred to as: 'Tpvt.'), as well as provisions set out in Article 81 of the Treaty establishing the European Community or it has a sound reason to assume it in the course of its procedure, the contracting authority shall notify the Hungarian Competition Authority thereof in accordance with the provisions of Tpvt. regarding notification and complaint.

2. In application of paragraph 1, the contracting authorities may have a sound reason to assume a breach of Article 11 of Tpvt. especially if

(a) the contents of at least two offers submitted in the course of the contract award procedure are the same or similar to an extent that exceeds the requirements of the contract notice or the tender documentation; or

(b) in the contract award procedure, at least two tenderers own a share in each other or the same person or organisation owns a share in at least two tenderers; or

(c) the same tenderers submit their offers in more than one contract award procedure launched by the contracting authority during the same fiscal year and the winner of the tender is in each case different from the winner of the previous procedures of the same kind.

Reasons behind competition distortion:

Notification to the Hungarian Competition Authority does not take place at the moment because cases referred to in paragraph 2 are relatively widespread and do not always involve illegal conduct within the given circumstances of the market. Based on the above, the weakness of this provision is that in case of the suspicion of violating the Competition Act (Competition Act) it has to be established by the public procurer. The Competition Authority initiates proceedings only afterwards, but it does not necessarily determine the violation of the Competition Act if conducts referred to under paragraph 2 are not against the Competition Act.

1. UNCERTAIN INTERPRETATION OF THE NOTIFICATION REQUIREMENT TO THE HUNGARIAN COMPETITION AUTHORITY

Possibility of elimination:

Only such cases should be defined as raising suspicion on the basis of competition distortion that simultaneously qualify to violate the Competition Act also. Provisions without any sanction create uncertain outcomes regarding whether notification obligations are current, and burden the market unnecessarily as well as provide grounds to misuse.

2. THE JOINT IMPLEMENTATION OF THE COMPOUNDING RULE AND THE 'DISREGARDING RULE'

Relevant statutory provision(s):

Article 40 *1.* It shall be prohibited to apply any of the estimation methods described in Articles 35 to 39 with the intention of avoiding the application of this Act, and to split up any procurement in violation of paragraph 2 with the same intention.

2. When calculating the estimated contract value, the value of all those supplies or works or services shall be calculated together which

(a) have been purchased during the same fiscal year [with the exception of cases covered by Article 39 (1)], and

(b) have the same procurement subject-matter and purpose, or their uses are directly interconnected.

3. Where a contract award procedure, as set forth in this Chapter, is to be conducted according to paragraph 2 due to the aggregate value of several procurement subject-matters each of which has a value below the Community threshold, their purchase pursuant to more than one contract award procedure under this Chapter despite the calculation of their aggregate value shall not constitute an act of avoidance of the application of this Act.

4. Where no account was taken of the provisions of paragraph 2 in calculating the estimated value, the subject-matters of procurements still to be procured as set forth in this Chapter in the fiscal year or in the twelve months in question may, regardless of their individual value, only be covered by a contract which is to be concluded pursuant to a contract award procedure under this Chapter.

5. Contrary to the provision set out in paragraph 2, the estimated value of public procurement contracts specified by Article 25 related to one work, shall not be calculated together with the estimated value of public works contracts related to a different work, except for public works contracts concerning common repairs, the estimated contract value of which shall be calculated together – in case of fulfillment of the criteria specified in paragraph 2 – even if those public works contracts concern several works.

6. Contrary to the provision set out in paragraph 2, when calculating the estimated contract value, the public procurement contracts having an estimated value net of VAT less than HUF 21.031.200 in case of services and supplies and less than HUF 262.890.000 in case of works contracts shall not be calculated together with the estimated value of other public procurement contracts, on condition that the estimated value of the public procurement contract not calculated together does not exceed 20% of the value that would have been established by the contracting authority in case of application of paragraph 2, as the total estimated value of the public procurement contract in question together with the public procurement contracts to be calculated with it according to paragraph 2.

Reasons behind competition distortion:

The compounding rule of paragraph 2 of Article 40, which – despite the fact that it was amended as of 15th September, 2010, and 1st March, 2010 –, is still the source of many debates regarding that it is hard to establish what is to be considered as interrelated use.

Possibility of elimination:

In connection to the review of the law, the overall consistency of Articles 35-45 is necessary in order to clarify for the contracting authority how to precisely calculate the estimated values of each subject-matter together and hence, how to establish whether the obligation to conduct public procurement exists, along with how to decide which public procurement regime has to be followed.

Relevant statutory provision(s):

Article 50 ***1.*** The contracting authority shall state the subject-matter and value of the public procurement in the contract notice.

2. The contracting authority may specify the value or quantity of the contract as a threshold or a ceiling and allow derivation therefrom, stating also the percentage of permitted discrepancy.

3. The contracting authority shall verify its procurement regarding if the nature of the subject-matter of the procurement allows division into lots. If the possibility of division into lots may be allowed due to the nature of the subject-matter of the contract the contracting authority shall allow division into lots in the contract notice, on condition that this possibility shall probably

(a) not entail a significant increase in the consideration of the procurement and

(b) not effect in a negative way the quality of the service or supplies or the performance of the works to be procured or other circumstances of the performance of the public procurement contract.

4. In the case of division into lots, the contract notice shall stipulate those elements of the subject-matter of the public procurement that may be tendered for in the form of division into lots.

5. In application of paragraph 3, the contracting authority may stipulate in the contract notice that the tenderer has the right to submit a tender for all the lots of the procurement, but the contracting authority may not make it mandatory for the tenderer.

Possibility of elimination:

The possibility of division into lots does not stem from the Directive, and the use of division into lots has not been studied by the legislator. Division into lots shall be a possibility and not an obligation so that subject-matters do not get scattered but get realized in reasonable 'packages'.

3. THE POSSIBILITY OF DIVISION INTO LOTS AND THE PROCEDURE TO BE FOLLOWED FOR DIVISION INTO LOTS

Reasons behind competition distortion:

The risk of legal remedy is significantly increased by the inaccurate stipulation of the act, as it is ambiguous for the sponsors which cases paragraph 3 shall apply to. Division into lots irrespective of scale economies does not take into account the priority of making efficient and reasonable use of the public funds. It may lead to superfluous remedy procedures, unsuccessful procedures and unnecessary administration. Hitherto, based on remedy practices, it is also impossible to determine in which cases division into lots shall be used.

4. THE REGULATION OF ABNORMALLY LOW VALUE AND THE COMPARISON OF OFFERS, THE 15%-THRESHOLD

Relevant statutory provision(s):

Article 86 *1.* The contracting authority shall request in writing the basic data determining the contents of those tender elements that are relevant for the assessment and an explanation, and shall notify the other tenderers of such request simultaneously in writing, if a tender contains a total consideration appearing to be abnormally low compared to the other tenders and their estimated value, with regard to any of the following units:

(a) the tender as a whole, or

(b) in the case of the possibility of division into lots, one part of the tender, or

(c) if the contract notice contains more than one constituent factors or sub-factors relating to the consideration, at least one of the constituent factors or sub-factors.

2. The contracting authority shall apply paragraph 1 especially in the case when the total consideration – with regard to one of the units specified in paragraph 1 (a)–(c) – included in the tender differs by more than 15% from

(a) the estimated value with regard to the same unit, if there is one tender;

(b) the arithmetical mean calculated by the contracting authority from the tender prices of the other tenders with regard to the same unit and the estimated value with regard to the same unit, if there are not more than three tenders;

(c) the arithmetical mean calculated by the contracting authority from the tender prices of the other tenders with regard to the same unit and the estimated value with regard to the same unit, by eliminating the two extreme values, if there are at least four tenders;

Reasons behind competition distortion:

During the assessment whether the value of the consideration is abnormally law, such estimated values have to be considered by the sponsor that do not fall under the obligations to publish according to the Act on Public Procurement. It is distortive to the calculations that the bid has to be compared to the average of other bids when establishing whether it is of abnormal value. When drawing up the tender, the offer can be distorted, burdening the parties with superfluous and unnecessary administration, moreover it significantly increases the risk of legal remedy.

Possibility of elimination:

Instead of detailed computational provisions and thresholds, general rules should be prescribed for the assessment whether the consideration value of an offer is abnormally low to ensure that requiring additional information and explanation about the consideration has to take place only when it is absolutely necessary. Requesting explanation calls the attention of the involved parties and automatically raises inclination to the use of remedies, which have not been beforehand estimated by the legislator, similarly to the case of the 15%-threshold.

Relevant statutory provision(s):

Article 243 The procedure pursuant to this Chapter shall not apply

(a) to the exceptions listed in Article 29, noting that the exception specified in paragraph (1) (a) shall not require preliminary decision making;

(b) to the procurement of textbooks, if it is carried out in accordance with the Act on the Rules for the Textbook Market, in the framework of the supply of textbooks to schools and the textbook is registered in the textbook register;

(c) in the case of legal services specified in Annex 4 and in the case of official public procurement consultant activity;

(d) to the procurement of supplies and services for the full boarding of hildren situated in children's homes and apartment homes on the basis of Act XXXI of 1997 on the Protection of Children and on Guardianship Administration, for the full boarding of those who receive after-care and of persons receiving social services under Articles 59-85/A of Act III of 1993 on Social Administration and Social Benefits;

(e) to hotel and catering services, entertainment, cultural and sports services specified in Annex 4, if the value of the service does not reach the Community threshold;

(f) to the purchase conducted through crisis management for humanitarian aid within foreign affairs assistance about which the competent committee of the Parliament has made a preliminary decision excluding the application of this Act;

(g) to the procurement of cold foodstuffs and cooking raw materials, fresh and processed vegetables and fruits, milk and dairy products, cereals, honey, eggs, horticultural plants;

(h) to purchases related to the preparation and conduct of the 2011 Hungarian EU Presidency;

(i) in case of a public service aimed at the creation of a literary (technical, scientific) work, or involving consulting or personal interpreting activity necessary for the performance of the contracting authority's core activity.

Article 251 ***1.*** The time-limit to submit tenders shall be set by the contracting authority at not less than twenty days from the date of dispatch of the notice including the invitation to tender.

2. If the estimated value of public supply or services does not reach HUF 25 million or the estimated value of public works does not reach HUF 80 million, the contracting authority instead of publishing as per Article 249 (1) shall send an invitation to tender – containing the data stipulated in Article 249 (2) – to at least three tenderers simultaneously, directly and in writing. In this case the minimum time-limit to submit tenders shall be fifteen days.

Reasons behind competition distortion:

The significant expansion of exemptions within simple procedures, furthermore permitting the application of simple procedure to 'three-offer' cases, which latter ones do not mean real tender calls (invitations) published in announcements (notices), may all jointly result in the elimination of public procurement obligations or may come under the scope of the three-bid procedures which otherwise should be conducted under regular public procurement procedures starting with public announcements.

Possibility of elimination:

It is necessary to review exemptions and to eliminate the 'three-bid' mock-procedure in order that contracts essentially agreed under non-competitive circumstances do not qualify the same as contracts resulting from regular public procurement procedures.

5. DISTORTION AND EXPANSION OF EXEMPTIONS UNDER RULES OF SIMPLE PROCEDURAL – INCLUDING THE PERMISSION OF 'THREE-BID' THRESHOLD AND SYSTEM

Reasons behind competition distortion:

Reserving the small value procedures only for small- and medium sized enterprises is distortive to competition furthermore it opens gates to bilker bidders. Consequently, it attracts in particular bidders acting less in accordance with good faith. Moreover, thresholds are neither based on preceding calculations, nor is their use is recommended in case of procurements financed with EU sources.

6. SUSTAINABLE PROCUREMENTS UNDER NATIONAL PROCEDURAL SYSTEM

Relevant statutory provision(s):

Article 253 ***1.*** The contracting authority may reserve the right to participate in a public procurement procedure pursuant to this chapter for tenderers not reaching in the previous year in the case of public supply and public services a revenue HUF 100 million net of VAT, in the case of public works a revenue of HUF 1 billion net of VAT, whose subcontractor(s)—intended to be employed for more than 10% of the contract value—named in their tenders comply with this provision as well.

2. In the case of public works and works concessions paragraph 1 only applies if the value of the public procurement does not exceed HUF 500 million.

3. The contracting authority shall ensure equal opportunities in its contracts reserved in accordance with paragraph 1 for those tenderers established in the European Union whose annual revenue does not reach the net HUF 1 billion.

4. If the contracting authority intends to reserve the right to participate in a public procurement procedure in accordance with paragraph 1 it shall indicate it in the invitation to tender.

Possibility of elimination:

It is unreasonable to maintain rules that are easily circumvented and represent only apparent advantages for small and medium-sized businesses, which on the other hand cannot be applied to subsidized procedures.

7. SUBCONTRACTOR – SEPARATION AND/OR INCLUSION OF ORGANIZATION PROVIDING RESOURCES

Relevant statutory provision(s):

2. 'subcontractor': an organisation or person which or who participates in a direct manner in the performance of the contract concluded in a contract award procedure involved by the tenderer, except for

(a) persons who are engaged in an employment relationship or any other work related legal relationship with the tenderer,

(b) organisations or persons who or which pursue their activity on the basis of an exclusive right,

(c) manufacturers, distributors and suppliers of basic material and parts intended to be employed,

(d) in case of public works, the supplier of building material;

3/D. 'organisation providing resources': an organisation or person, which or who shall not be considered as subcontractor and is not covered by Article 4 (2) (a)–(d) and, by presenting its related resources, contributes to the certification of the suitability of the tenderer in the public procurement procedure;

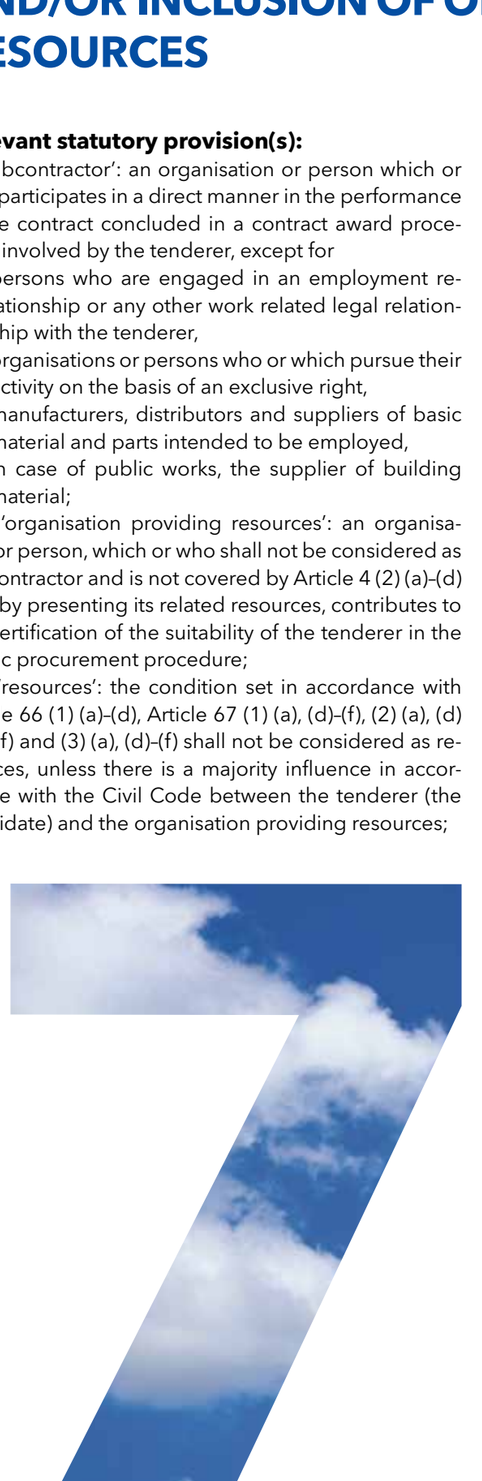
3/E. 'resources': the condition set in accordance with Article 66 (1) (a)–(d), Article 67 (1) (a), (d)–(f), (2) (a), (d) and (f) and (3) (a), (d)–(f) shall not be considered as resources, unless there is a majority influence in accordance with the Civil Code between the tenderer (the candidate) and the organisation providing resources;

Reasons behind competition distortion:

The conditional application of 'organization providing resources' and the case listed under point 3/E establish conditions for subcontracting and leads to that the organization providing resources has to be included as a subcontractor.

Possibility of elimination:

All of the involved parties cannot be meant to get included as subcontractors. It is necessary to have a rule in line with the terminology of the Directive ('organization providing appropriate resources'), which would clearly separate the definition of subcontractors who essentially cooperate in the delivery of the contract.



Relevant statutory provision(s):

Article 70 *1*. Tenderers shall prepare and submit their tender in accordance with the requirements regarding the content as defined in the contract notice and the tender documentation and regarding the form as defined in Article 70/A (1)–(3). The contracting authority, in the contract notice, may prescribe more simple requirements regarding the form. The accessibility of the tender documentation in Hungarian, and the possibility of submitting a tender in Hungarian shall be ensured in all cases.

2. The tender shall contain, in particular, the express declaration of the tenderer with regard to the conditions of the contract notice, the conclusion and the performance of the contract and the amount of the consideration requested. The tenderer shall also declare whether it classifies as a micro, small or medium-sized enterprise under the Act on Small and Medium-Size Enterprises and the Support of their Development.

3. In respect of the grounds for exclusion, tenderers shall act in compliance with Article 63. Furthermore, tenderers shall provide proof of the adequacy of their financial and economic standing, technical and professional ability required for the performance of the contract and furnish the certificates thereon in the tender.

4. In the same contract award procedure, or for the same part where the possibility of division into lots is provided, a tenderer

(a) shall not submit another tender jointly with another tenderer,

(b) shall not participate as subcontractor intended to be employed for more than 10% of the contract value by another tenderer,

(c) shall not provide resources for another tenderer.

5. In the same tender, or in relation to the same part where the possibility of division into lots is provided, a person (an organisation) may not appear as a subcontractor and in the same time as an organisation providing resources.

6. If a person (organisation) – who is not subject to the provisions of Article 4 (2) (a)-(d) – will participate in the performance of the contract – in case of the possibility of division into lots, the contract concerning one part – for more than 25% of the value of the public procurement, this person (organisation) may not be considered as a subcontractor, and shall be referred to in the tender as a joint tenderer and shall be involved in the performance of the contract as a joint tenderer.

7. The percentage of the participation of a person (an organisation) in the performance of a contract is determined by his share from the consideration – net of VAT – relating to the subject-matter of the contract.

8. In the tender, a reading sheet shall be included containing all the information specified in Article 80 (3).

Reasons behind competition distortion:

The provisions, stating that subcontractors intended to be deployed in access of the value of 25% of the public procurement automatically shall qualify as bidders, has a direct impact on the freedom of bidding. Furthermore, it also has an impact on the joint liability of bidders handing in a joint offer. Consequently, smaller bidders get overshadowed; in fact, the participation of subcontractors renders to be disproportionately and unreasonably more difficult. The reach of the 25%-threshold at the time of delivery, for example, qualifies as the violation of the contract.

Possibility of elimination:

The solution is the abolishment of the 25%-rule. The abolishment is however only possible subsequent to the reconsideration and the amendment of invoicing rules.

8. 25 %-RULE OF COOPERATION – QUALIFYING AS A BIDDER INSTEAD OF SUBCONTRACTOR

9. RULES OF INVOICING THAT RESULT IN THE INCREASE OF CIRCULAR DEBT

Relevant statutory provision(s):

Article 305 ***3.*** The party entering into the contract as contracting authority, and in the case of support from the European Union payment by the suppliers, the party obliged to pay the consideration in application of this Article (hereinafter referred to as the party entering into the contract as contracting authority) shall pay the consideration according to the following rules:

(a) the party (parties) entering into the contract as tenderer shall make a declaration to the contracting authority till the date when the receipt of performance is issued the latest, stating that among them who is entitled for which sum;

(b) all the parties entering into the contract as tenderer shall make a declaration till the date when the receipt of performance is issued the latest stating the subcontractors and the experts not being in employment or any other work-related legal relationship involved by them are entitled for which sum one by one, and at the same time shall invite them to issue these invoices;

(c) all the parties entering into the contract as tenderer after the acknowledgement of performance without delay are entitled to issue an invoice towards the contracting authority on the sum that are due for the subcontractors and the experts not being employment or any other work-related legal relationship involved by them;

(d) the party entering into the contract as contracting authority shall transfer the consideration of the invoice as per point (c) to the tenderers within fifteen days;

(e) the party entering into the contract as tenderer shall pay the invoices of the subcontractors and experts without delay, or withhold it (or a part of it) according to Article 36/A (3) of the AOT;

(f) the parties entering into the contract as tenderer shall hand over the copies of certifications of the transfers as per point (e), or the joint tax certification showing public debt of the subcontractor (expert) to the contracting authority [the latter shall be handed over aiming that the contracting authority shall be able to determine that the party entering into the contract as tenderer has legally not paid the (whole) sum to the subcontractor];

(g) the parties entering into the contract as tenderer shall hand over their invoices on the remaining part of the consideration, the countervalue of which shall be transferred by the party entering into the contract as contracting authority to the parties entering into the contract as tenderers, if they have fulfilled their payment obligation regarding Article 36/A (3) of the AOT as well;

(h) if any of the parties entering into the contract as tenderer does not fulfill its obligation stipulated in point (e) or (f), the contracting authority shall safe-keep the remaining part of the consideration and this shall be due the tenderer if it certifies that it has fulfilled its obligation stipulated in point (e) or (f) or certifies with an authentic document that the subcontractor or expert is not entitled to the sum or part of the sum declared by the tenderer according to point (b);

(i) in case of contract award procedures carried out wholly or partially with the support of the European Union, the time-limit stipulated in point (d) shall be forty-five days.

Reasons behind competition distortion:

The indirect but primary satisfaction of subcontractors' and experts' increases circular debts and the conversion cycle of money; it is not in accordance with the VAT-rules. Moreover, it induces bidders to conceal their subcontractors if they do not want to postpone their own payments for a long time. The solution based on the French model has proved inadequate; it conveys a lot of unnecessary expenses and administration; it directly intervene to contractual relations, resulting in delivery and monitoring methods that are hard to trace and result in the violation of law.

Possibility of elimination:

Rules of invoicing are unsustainable and cause damage in the area of procurements.

Relevant statutory provision(s):

Article 123/E ***1.*** The dialogue shall be conducted jointly with the candidates only if all candidates have so agreed.

2. Dialogues may be conducted in one or in more stages. In the case of a dialogue with several stages the contracting authority may invite for successive stages only candidates that have submitted the most favourable proposal (variant of proposal) in the first, or in the successive stage for the solution specified in the invitation to participate on the basis of the conditions according to Article 57 (3). The number of candidates shall not be less than three even after the last stage of the discussion. The proposed solutions of candidates that have submitted varying solutions shall be compared on the basis of the conditions specified in the invitation with respect to Article 57 (3). Where a candidate submits a multi-variant proposal for solution, the individual variant proposals shall be considered as independent proposals, and the contracting authority is not bound to invite to a successive stage (stages) of the dialogue any specific solution proposed by a candidate.

3. Where a solution proposed by a candidate does not contain a proposal concerning Article 123/D (2), or where the method of the solution contained in such a proposal (or in a variant proposal) shall not be in compliance with the conditions defined by the contracting authority regarding the subject-matter of the public procurement, the relevant public procurement technical specifications, as well as the contract award requirements, or furthermore, with the frame and the expectations of the contracting authority concerning the elements that are the subject of the proposal, the contracting authority shall declare invalid the proposed solution or any variant of that solution, and shall proceed according to Article 93 (1).

Possibility of elimination:

The abolition of the obligation to include at least three bidders is in accordance with the Directives and makes the otherwise anyways overregulated type of procedure more simple.

10. THE LEGAL LIMITATIONS IN THE USE OF THE WIDESPREAD PRACTICE OF CONSULATION IN THE EUROPEAN UNION

Reasons behind competition distortion:

As a result of the incorrect implementation of the Directive, at the moment, the number of bidders must not be less than three before the last stage of discussions during the procedures. This very provision is actually stricter than Article 92/A abolished previously, that stated the obligation of involving only two bidders. Because of the solution used in Hungary, the procedure generally used in the EU is hardly used by sponsors in Hungary.

(f) determine whether the second part of the framework agreement procedure shall be managed - in accordance with the provisions set out in this Act - by an organisation exclusively authorized to invite tenders or by an organisation under the effect of locally centralized public procurement or by an organisation which joined voluntarily;

(g) may determine the detailed rules of locally centralised public procurement - different, as required by such procedures, from those set out in this Act - in accordance with European community law.

11. THE LIMITATIONS IN APPLYING LOCALLY CENTRALIZED PUBLIC PROCUREMENTS

Relevant statutory provision(s):

Article 17/B *1.* Local government may implement public procurement concerning organisations under its control in a locally centralized, combined manner.

2. The provisions of this Act and the decree of the local government set out in paragraph 3 shall apply to locally centralized public procurement procedures.

3. Local government shall promulgate a degree on locally centralized public procurement that shall:

(a) appoint the organization exclusively entitled to invite bids for locally centralized public procurement;

(b) determine the scope of budgetary authorities of a local government which shall be obliged to act in accordance with the rules on locally centralized public procurement, together with the conditions of voluntary access to the procedure for companies which are owned by a local government to an extent exceeding 50 %;

(c) determine the scope of supplies and services under the effect of locally centralized public procurement;

(d) determine the rules for cooperation between the organization exclusively entitled to invite bids and the organizations under the effect of locally centralized public procurement, in particular the data provision obligations of the parties, and the manner in which the data is supplied and managed;

(e) determine the calculation of the fee, and the way this fee is paid to the organization exclusively entitled to invite bids for locally centralized public procurement for only the actually costs of the work on locally centralized public procurement, and the obligation to provide information and briefings for local government;

Reasons behind competition distortion:

The rules of locally centralized public procurements restrict the possibilities of reasonably and/or naturally formed centralized procurement since they can only be applied to local governments. Proprietary institutions may be included under one umbrella not only in case of local governments from the viewpoint of public procurements, and not only classical sponsors can be regarded as relevant in these cases.

Possibility of elimination:

Locally centralized public procurements should not only be possible for local governments for natural centralization to be in line with the provision of the EU Directives, but other sponsors should be also included under these rules.

Relevant statutory provision(s):

Article 83 *1.* The contracting authority shall ensure the possibility of supplying missing information under identical conditions for all tenderers.

2. In the course of supplying missing information, the tender may be modified, supplemented in view of making it suitable for the requirements stipulated in the contract notice, the tender documentation or the acts of legislation on public procurement, but the following modifications, supplements cannot be executed by the supply of missing information:

(a) the supply of missing information cannot result in the modification of the tender elements to be assessed pursuant to Article 81 (4);

(b) if a constituent factor relating to the evaluation concerns the professional tender, the professional tender cannot be modified, supplemented;

(c) in the course of the supply of missing information the tenderer shall not supplement the tender by naming and submitting the relevant documents of a new joint tenderer, a subcontractor intended to be employed for more than 10% of the public procurement, or an organisation providing resources;

(d) in the course of the supply of missing information, the errors because of which the tender has already been invalid – pursuant to Article 88 (1) (a) or (b) – at the time of its submission, cannot be corrected. For this purpose, it has to be taken into account that the tender guarantee is not equivalent to the document thereof.

Reasons behind competition distortion:

With regard to the course of supplying missing information, appropriately, the legislator has expanded the circle of elements that can be handed in during the course of supplying missing information so that formal deficiencies, mistakes in declarations can be treated in a better way and thus they result in less invalid tender applications. However, it is not so simple to separate elements to be evaluated as it is stated in paragraph 2 thus it can lead to extraordinarily lots of legal debates and to the illegal modification of tender applications. The wording referring to the modification of the tender application weakens the strict rules of biding applications.

Possibility of elimination:

For the sake of non-discrimination, it is necessary to strictly regulate and clarify the rules of supplying missing information together with the simplification of minimal requirements prescribed regarding formal elements which, at the moment, in case of cancelling on supplying missing information still leads to valid tender offers. It would be necessary to avoid in the phrasing of this paragraph the implication of such possible modification.

12. RESTRICTED PERMISSION OF MODIFYING THE OFFER IN THE COURSE OF SUPPLYING MISSING INFORMATION

13. THE RESTRICTIONS REGARDING THE VALUATION OF THE PRODUCT, FAULTY QUALIFICATION CRITERIA

Relevant statutory provision(s):

Article 67 *1.* In the case of public supply contracts – considering the nature, volume and purpose thereof – the following evidence may be furnished regarding the suitability of the technical and professional ability of the tenderer and its subcontractor intended to be employed for more than 10% of the contract value for the purpose of performing the contract:

(a) a list of major deliveries during, at least, the last three years (indicating at least the dates of the delivery, the other party to the contract concluded, the subject-matter of the delivery, as well as the sum of the consideration or another data referring to the quantity of the previous delivery);

(b) a description of the supplier's technical facilities, its quality assurance measures and its study and research facilities;

(c) an indication of the professionals (bodies) and managers envisaged to be involved in the performance, indicating also their qualifications, especially those responsible for quality control;

(d) a description, sample and/or photograph of the product to be supplied, the authenticity

Reasons behind competition distortion:

As the result of incorrect implementation of the Directives, there is little possibility with some exceptions to be able to assess a product based on its higher standards or its additional features under the present criteria. Consequentially, without deploying any circumventing solution, only the minimal scheme of requirements of given product can be prescribed by the sponsor. Bidders offering cheaper but occasionally newer versions of a certain product or more capacities cannot actually enjoy the sponsor's preference in the present system of rewarding.

Possibility of elimination:

As no reasons can be found to keep this rule among the applicable ones, it is necessary to clarify that additional features of a product, higher quality can be included in the assessment, namely none of these aspects shall be excluded because of the provision set forth under paragraph 1 of Article 67 of the Act on Public Procurement.

14. THE NECESSARY TIMEFRAME OF COURT REMEDY PROCEDURES IS IMPOSSIBLE TO SCHEDULE – THERE ARE NO TIME RESTRICTION, REGULATED TIMEFRAME SET FORTH FOR THE REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT ARBITRATION BOARD, THUS THE OCCASIONAL DECISION TO DISMISS HAS NO DIRECT AFFECT ON THE FAIRNESS AND LAWFULLNESS OF COMPETITION

Relevant statutory provision(s):

Article 348/A *1.* The court shall make its decision on the substance of the case without holding a trial, however upon the request of the parties the court shall hold a hearnig. Holding a hearing may be requested by the claimant in his application and by the defendant in his declaration related to the application. The intervening trial shall be requested in accordance with Article 338 (2) of the Civil Code. For the adjudication without holding a trial Article 338 (3), (5) and (6) of the Civil Code shall apply.

2. Article 332/B of the Civil Code shall be applied with the derogation that, the first trial shall be hold within thirty days following the receipt of the documents at the court and if there is no need to conduct a procedure of evidence, or in the case of a procedure without a hearing the decision shall be made within this time-limit. When counting the time-limits the time period for the submission of the missing information shall not be taken into account.

Reasons behind competition distortion:

The Public Procurement Act prescribes binding deadlines for the procedure of the Public Procurement Arbitration Board. As opposed to this, there are no such obligatory deadlines set forth with regard to the review of the decision of the Public Procurement Arbitration Board. The main characteristic of the review procedure is that the parties request the court to hold hearings. Consequently, the first hearing takes place within 30 days, but if the court orders the parties to supply missing information or conducts further verification of evidences and there are further hearings as a result of this, it is impossible to project the date of closing a debate.

Possibility of elimination:

According to Section XX of the Act on Civil Procedures public procurement litigation should fall under specific regulation that would tie the first instance and appeal court procedures to deadlines.

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